the parties, who are closely related to one another should come to an end and that the parties and others involved should be prepared and minded to come back to terms with one another as they were once before.

The appeal is therefore allowed with costs and the deposit should be refunded to the appellants.

Appeal allowed.

Solicitors: *S.E. Rajah & Co.; Datuk Wan Mustapha & Co.*

PENGARAH PELAJARAN, WILAYAH PERSEKUTUAN & ORS. v. LOOT TING YEE

[F.C. (Lee Hun Hoe C.J. (Borneo), Wan Suleiman & Salleh Abas F.JJ.) July 7 & September 5, 1981]

[Kuala Lumpur — Federal Court Civil Appeal No. 177 of 1980]

Administrative Law — Declaration — Application to declare decision to transfer public officer inoperative and void — Application to strike out statement of claim — Public Officer holding office during pleasure of Yang di Pertuan Agong — Right to transfer public officer — Discretion of Minister — No proof of bad faith or malice.

Constitutional Law — Public Service — Public officer holding office during pleasure of Yang di Pertuan Agong — Transfer of public officer.

In this case the respondent had been told that he was transferred from a school in Kuala Lumpur to a school in Trengganu. He appealed to the Minister of Education, who confirmed the transfer. The respondent thereupon applied for a declaration that the transfer was inoperative and void. The appellants applied to have the statement of claim struck out on the ground that the issues raised in the statement of claim were non-justiciable and that they were otherwise scandalous, frivolous, vexatious and an abuse of the court's process. Vohrah J. dismissed the appellant's application. He held that the power of transferring an officer must be exercised by the transferring authority honestly, *bona fide* and reasonably and as the statement of claim contained allegations of bad faith the respondent's suit should proceed to trial. The appellants appealed.

Held: (1) as a civil servant holds office during pleasure, not only the length of his service is subject to pleasure but the place and time of his service is similarly subject to pleasure. The only difference is that as regards dismissal and reduction in rank procedural safeguards contained in Article 135 of the Federal Constitution must be observed whereas in cases of transfer and other matters no such safeguards need be followed;

(2) thus whether a civil servant should be transferred and if so where and when the transfer is to be made are matters for the Government to decide. No useful purpose could thus be served in this case by holding a full trial of the respondent's allegations of *mala fide* and unreasonableness;

(3) as employment in the public service is during the pleasure of the Yang di Pertuan Agong, so long as a public officer is in the service, it is for the Government to decide whether his transfer is in the public interest or not having regard to the fact that the Government has a large public duty to perform. There was absolutely no legal basis for the court to interfere with the Government's discretion;

(4) there is nothing in the Constitution which entitles an officer to bring his grievances before the court whenever he is punished unless and until the punishment complained of amounts to a dismissal or reduction in rank. No matter how aggrieved an officer is by the punishment, he has no cause of action;

(5) No officer can claim to have a legal right of non-transferability because by joining the Government service he has become liable to transfer;

(6) there was nothing to show that the respondent had been reduced in rank by the transfer. Taking him away from a supervisory capacity is not a reduction in rank within the meaning of Article 135 of the Federal Constitution;

(7) there was no evidence to show that the respondent was transferred because of personal animosity. In this case it was clear that the decision was made by the Minister, who had genuinely considered the merits of transfer;

(8) even on the assumption that the allegations in the statement of claim were true, the respondent had no cause of action. In this case the statement of claim not only did not show any reasonable cause of action but it was also scandalous, frivolous, vexatious and an abuse of the process of the court.

Cases referred to:-

(1) *Partap Singh* v. *State of Punjab* A.I.R. 1964 S.C. 72.

(2) *Malinamani* v. *Commissioner Habli Dharwar Municipal Corporation* [1973] Kar. L.J. 121.

(3) *State of Bihar* v. *Abdul Majid* A.I.R. 1954 S.C. 245, 249.

(4) *Franklin* v. *Minister of Town and Country Planning* [1948] A.C. 87, 104.

(5) *Stephen Kalong Ningkan* v. *Government of Malaysia* [1968] 2 M.L.J. 238.

FEDERAL COURT.

Lim Beng Choon (Senior Federal Counsel) (*Miss Zaleha Zahari*, Federal Counsel, with him) for the appellant.

Karpal Singh (*S.T. Lim* with him) for the respondent.

Salleh Abas F.J. (delivering the judgment of the Court): This is an appeal from the decision of Mr. Justice Vohrah, refusing the appellant's application to strike out the respondent's claim.

The respondent was a school teacher attached to Sekolah Rendah Jenis Kebangsaan (C) Naam Kheung, Batu 3½ Jalan Cheras, Kuala Lumpur (referred to in the judgment as "NK School"). He joined the teaching service on January 1, 1953 first as a member of Unified Teaching Service. When this service was abolished upon the implementation of Abdul Aziz Salary Report (1971), on his option the respondent was accepted into the Government Teaching Service with effect from April 1, 1972 and was placed in the service as a Category B1 teacher. He thus, in the words of Encik Abdul Halim Shah bin Abdul Murad, an officer in the Ministry of Education which words are contained in his affidavit sworn on May 3, 1980, and agreed to by the respondent in his affidavit sworn on June 28, 1980, becomes "directable, deployable and transferable to perform teaching, administrative and other duties that may be reasonably required of him and also becomes subject to all Service Circulars, General Orders, Treasury Instructions and other rules and regulations applicable to members of the Public Service". The respondent has been teaching in NK School since January 11, 1965 and has been a category B1 teacher ever since he joined the Government Teaching service on April 1, 1972.

By letters dated December 31, 1979, July 9 and 12, 1980 Pengarah Pelajaran Wilayah Persekutuan (Appellant No. 1) informed the respondent that he

was transferred to Sekolah Rendah Jenis Kebangsaan (C) Chung Hwa, Jerteh, Trengganu to whose Headmaster he was required to report for duty on February 1, 1980. The respondent protested against this transfer alleging that it was unjust and improper and also requested Appellant No. (1) to cancel it. As the request was not acceded to the respondent appealed to the Minister of Education, (Appellant No. 2) whose decision was finally conveyed to the respondent in a letter dated February 5, 1980 to the effect that the transfer had to remain and that the respondent had to abide by it.

Aggrieved by this decision, on February 14, 1980 the respondent sued Appellant No. (1) and Appellant No. (2) claiming a declaration that the impugned transfer was inoperative and void and that he is still "legally entitled" to continue teaching at NK School. He also asked for some other ancillary remedies. After further and better particulars were supplied to the appellants at the request of Mr. Lim Beng Choon Senior Federal Counsel acting on their behalf regarding the allegations made in the statement of claim, the appellants applied by summon-in-chambers to the court to have the statement of claim struck out on the ground that the issues raised in the statement of claim are non-justiciable and that they are otherwise scandalous, frivolous, vexatious and abuse of court's process. After hearing arguments in the open court, Mr. Justice L.C. Vohrah dismissed the appellants' application with costs. The reasons given by the learned judge as far as we can gather from his judgment is that the power of transferring an officer must be exercised by the transferring authority *honestly, bona fide and reasonably* and that as the statement of claim contains allegations of bad faith the respondent's suit must proceed to trial. He thus dismissed the appellants' application to strike out the statement of claim.

The respondent was transferred on the instruction of the Minister of Education under paragraph 16 of the Perintah-Perintah Am which is as follows: —

"Seseorang pegawai boleh diarahkan berkhidmat dimana-mana sahaja oleh Kerajaan melainkan ada syarat-syarat khas yang menetapkan sebaliknya."

(An officer may be directed to service anywhere by the Government unless there are terms and conditions providing otherwise.)

It is the respondent's case that the transfer of a government employee is reviewable by the court if it could be shown that the transfer was actuated by bad faith. In support of this proposition learned counsel for the respondent cited two Indian cases. *Partap Singh* v. *State of Punjab*[1] and *Malinamani* v. *Commissioner Habli Dharwar Municipal Corporation.*[2] With respect we find ourselves unable to accept the submission.

The law relating to civil service in Malaysia is based upon a twin principle that every employee holds office during pleasure of the Yang di-Pertuan Agong and that the qualifications for appointment and conditions of service are regulated by him, in addition and subject to any law on the same subject matters having been made by Parliament. So far Parliament has not yet made any law on the subject of civil service except the Pensions Ordinance and Parliamentary Service Act (No. 12 of 1963). These two Acts are irrelevant in the present appeal. The Constitution prescribes no limit on the scope and extent of the pleasure of the Yang di-Pertuan Agong but when power to dismiss an employee or to reduce him in rank is to be exercised, the Constitution prescribes procedural restrictions as to the manner and by whom this power is exercisable. Thus the pleasure of the Yang di-Pertuan Agong not only applies to tenure of office of an employee but also extends to a multitude of subject matters such as appointments, promotions, transfers, salaries, leaves and other benefits. These are all being regulated by civil service rules known as Perintah-Perintah Am made by the Yang di-Pertuan Agong under Clause 2 and Article 132 and also various circulars, instructions issued from time to time by appropriate authorities in the Government.

The approach taken by the courts in India seems to be that the principle of holding office during pleasure is limited to cases of dismissal and termination of services only and that it has no relation or connection with other cases. In *State of Bihar* v. *Abdul Majid*[3] the Supreme Court of India held that the principle had no application to a case where a civil servant was suing for arrears of salary. Mahajan C.J. declared that the principle simply concerned itself with the tenure of office of the civil servant and that it had nothing to do with his claim for arrears of salary. In *Pratap Singh* v. *State of Punjab*[1] the court held that the principle of *"durante bene placito"* did not apply to a case where a civil servant was challenging a Government order revoking an earlier order permitting him to retire and granting him leave prior to retirement. Ayyangar J. delivering the majority opinion of the court described the contrary submission of the Attorney-General who appeared for the State Government as "patently unwarranted besides being contrary to" the court's decision of *State of Bihar* v. *Abdul Majid.*[3] The result of these two cases is therefore that the concept of *"durante bene placito"* is given a very restricted meaning; it being limited to cases of dismissal and termination of service only. With respect we are unable to accept these decisions as being the law in Malaysia. In our view as a civil servant holds office during pleasure, not only the length of his service is subject to pleasure but the place and time of his service is also similarly subject to pleasure. The only difference is that as regards dismissal and reduction in rank procedural safeguards contained in Article 135 must be observed, whereas in cases of transfer and other matters no such safeguards need be followed. Thus whether a civil servant should be transferred, and if so where and when the transfer is to be made are matters for the government to decide. No useful purpose could thus be served in this case by holding a full trial of the respondent's allegations of *mala fide* and unreasonableness.

Counsel for the respondent relied heavily on *Malinamani* v. *Commissioner Hubli Dharwar Municipal Corporation.*[2] It is his submission that since the transfer in *Malinamani's* case could be challenged on the basis of bad faith the respondent therefore has an actionable right to challenge the transfer order. With respect we cannot accept this submission. In

Malinamani's case the employee concerned was appointed under Bombay Provincial Corporation Act (55 of 1949) and therefore not subject to tenure during pleasure of the President at all. This is different from our case. Further the transfer dealt with in that case was not a transfer as we understand it in the context of civil service in Malaysia. It was a transfer, if not a transformation, of an employee from being a library attendant to being a fireman. Whereas in our case the respondent continues to be a teacher in the same category as he was before the transfer; the transfer being only as to the place of work and not as to the nature of service. We therefore rule that *Malinamani's* case is completely useless for our purpose.

We now turn to the respondent's statement of claim. The allegations which the respondent hopes to find a cause of action are contained in paragraphs 13, 14, 15, 16, 17 and 18. These six paragraphs are in fact repetitive of one another and their combined effect is that the transfer was void because:

(1) it was not in the public interest (paragraph 13);

(2) it was not ordered honestly and reasonably (paragraph 14);

(3) it was a victimisation of him for holding views on Chinese culture and education which views subjected him to the open attacks by MCA (paragraph 15);

(4) it was punishment (paragraph 16);

(5) it was a reduction in rank (paragraph 17); and

(6) the transferring authority had no absolute right to transfer him (paragraph 18).

As to the allegation that the transfer was not in the public interest it suffices us to say that as employment in the civil service is during pleasure of the Yang di-Pertuan Agong, as long as he is in the service, it is for the Government to decide whether his transfer is in the public interest or not, having regard to the fact that the Government has a larger public duty to perform. It is not for us to interfere with the discretion of the Government in this matter. To do so would only amount to an unjustifiable usurption of Government's discretion by us. There is absolutely no legal basis for us to interfere with the Government's discretion.

Similarly the reasonableness of the respondent's transfer is not for us to decide. As regards punishment there is nothing in the Constitution which entitles an officer to bring his grievances before the court whenever he is punished unless and until the punishment complained of amounts to a dismissal or reduction in rank. No matter how aggrieved an officer is by the "punishment" in our view he has no cause of action. As regards the allegation that the transferring authority had no absolute right to transfer him, the answer is that the respondent holds office during pleasure of the Yang di-Pertuan Agong. If an officer can be dismissed at pleasure (subject only to observance of Article 135) similarly he can be asked to serve anywhere at pleasure. No officer can therefore claim to have legal right of non-transferability because by joining the Government service he has become liable to transfer.

Regarding the allegation of reduction in rank the respondent swore an affidavit saying that since 1973 he became a supervisor of the school and that in that capacity in the absence of the Headmaster and the Deputy Headmaster his duties included administration and overall charge of teachers of the school. His transfer to Chung Hwa School in Jerteh, he claims, albeit retaining Category B1 teacher deprives him of the appointment of supervisor of the school. In our view the work of a supervisor does not involve any extra remuneration payable to him although he is required to do some administrative work in the absence of the administrative head and deputy head. Although he and many others may feel that taking him away from the supervisory capacity is a demotion, in our view this act does not seem to be reduction in rank within the meaning of Article 135 of the Constitution. His transfer to Chung Hwa School does not reduce his rank below that of a category B1 teacher which he continues to retain, nor would he receive less remuneration. According to affidavit of Encik Abdul Halim Shah which was agreed to by the respondent, he was, on joining the Government service "accordingly directable, deployable and transferable to perform teaching, administrative and other duties...". We therefore find nothing in this allegation which merits holding a trial.

The only paragraph which alleges malice is paragraph 15, in support of which the respondent swore two affidavits — one on April 3, 1980 and another on June 30, 1980. He also supplied further particulars on April 17, 1980 at the request of the appellant. These allegations are as follows. The respondent is not a member of any political party, but he was interested in, and has championed the cause for, the preservation of Chinese culture and education in the country. He has been the Vice-President of the United Chinese School Teachers' Association since 1966 and Vice-Secretary of Merdeka University Sdn. Berhad since 1974 — a company dedicated to the cause of establishing a University by that name to cater for students of Chinese Schools who are unable to gain entry into the existing Universities and colleges. He is active in other organisations also. His activities and views on Chinese education and in particular on Merdeka University brought him into open confrontation with the Malayan Chinese Association (MCA), a member of the ruling parties. He related an incident wherein on November 25, 1978 one Tan Chow Bock, an MCA Perak Youth leader requested Y.B. Datuk Chan Siang San, Deputy Minister of Education to teach the respondent a lesson by transferring him to Ulu Kelantan in order to prevent the respondent from quarrelling with the MCA on Chinese education. He thus alleged that his transfer was prompted by malice and that because of his views on Chinese culture and education he was therefore victimised.

The substance of these allegations is simply that he was transferred because of personal animosity between him and MCA. But there is no allegation that the transfer of the respondent was at the instance of the Deputy Minister of Education. By relating the incident that the Deputy Minister was publicly asked to transfer him to Ulu Kelantan, the respondent was in fact suspecting that the Deputy Minister had a

hand in the making of the transfer order. There is absolutely no basis for this suspicion or surmise because the transfer was not made on the order of the Deputy Minister but that of the Minister of Education himself. The real question in this case is whether or not the Minister had genuinely considered the merits of the transfer. With respect we fail to see anything in this story which goes to show that he did not do so and that he was so low and so irresponsible as to take into account the related incident which had taken place two years previously.

In *Franklin* v. *The Minister of Town and Country Planning*[4] the House of Lords refused to take into consideration a speech made by the Minister at a political rally for the purpose of determining the validity of an order made by him even though the speech appeared to have forejudged the making of the order. It was held that the real question was whether the Minister had genuinely considered the report and objections before making the order. Thus in our view not only the story of this particular MCA Meeting was irrelevant but also the Minister who instructed the transfer was not the one who attended the meeting. This story is completely irrelevant.

Perhaps it is natural for the respondent who is so steeped in activities relating to Chinese culture and education to feel that he is victimised because the transfer will result in the curtailment of these activities, if not, a complete cessation. Again even on the assumption that the allegations were true we are not prepared to hold that there was any bad faith in such transfer and therefore there is no need for the case to go on trial. The Government has formulated a certain policy on education and has been returned to power with a mandate, *inter alia,* to carry through that policy into effect. The respondent as its servant is not only opposing that policy but also carrying out activities hostile to the Government's interest. In the circumstances we cannot see how, in implementing the policy whereby the respondent had to be transferred from where he was to some other school, the transfer is said to be ordered in bad faith. Was it not the respondent who placed himself in the position which led the Government to transfer him? Here even assuming that the respondent's office is not during pleasure we cannot see how the Government as an employer is so powerless that it cannot take any action on its employee, when the latter has carried out activities detrimental to its interest. Surely an employer expects, and is entitled to, obedience by his servant?

We are fortified in this approach by a similar line taken by their Lordships of the Privy Council in *Stephen Kalong Ningkan* v. *Government of Malaysia.*[5] In this case the Government took steps to deal with constitutional crisis in Sarawak involving the passing of an Act of Parliament to amend the Constitution of Sarawak and the removal of the incumbent Chief Minister. Their Lordships refused to hold that the passing of the Act and the removal of the Chief Minister might cause him naturally to feel that the Act was directed against him personally. Lord MacDermott, delivering the judgment of the Privy Council said: —

> "It is not for their Lordship's to criticise or comment upon the wisdom or expediency of the steps taken by the Government of Malaysia in dealing with the constitutional situation which had occurred in Sarawak, or to enquire whether this situation could itself have been avoided by a different approach. But, taking the position as it was after Harley, J. had delivered judgment in September 1966, they can find, in the material presented, no ground for holding that the respondent government was acting erroneously or in any way mala fide on taking the view that there was a constitutional crisis in Sarawak. . . ."

Likewise in this appeal we are not prepared to hold the transfer of the respondent to be prompted by inproper motive or bad faith even if it is true that the transfer was due to his views on Chinese education, which are in conflict with the known policy and views of the Government. A person who is playing with fire cannot complain if he gets burnt in the process. Similarly a man riding on tiger's back will have himself only to blame if in the act of riding he is eaten by the tiger if he survives at all. He should know the limits of his capability. Thus a servant should know his legal limits when he openly engages himself in activities which his employer considers to be inimical to his interest.

Having examined the allegations in the statement of claim we are of the view that even on the assumption that the allegations were true, the respondent has no cause of action. By loading into this statement of claim such allegations as victimisation, reduction in rank, punishment, public interest and abuse of power he was hoping that anyone of these will succeed to show a reasonable cause of action. But little did he realise that the suit was based on a misconception of the law. In the circumstances we hold that the statement of claim not only does not show any reasonable cause of action but is also scandalous, frivolous, vexatious and an abuse of process of court.

The appeal is allowed with costs and the appellant's summons-in-chambers filed on May 31, 1980 is allowed which means the statement of claim is struck out. Deposit is refunded to the appellants.

Appeal allowed.

Solicitors: *Karpal Singh & Co.*